

## NOTICE

### **The Maine Supreme Judicial Court is seeking comments on Draft Proposed Amendments to the Maine Rules of Appellate Procedure governing briefing and the appendix to the briefs**

Several amendments to Rules 7, 8 and 9 of the Maine Rules of Appellate Procedure governing briefing of appeals and preparation of the appendix to the briefs are proposed for consideration. Following this notice are the draft proposed rules amendments and draft advisory notes that describe each amendment. The Supreme Judicial Court invites comments on the proposed draft rule amendments to be submitted to the Executive Clerk of the Supreme Judicial Court by letter or by e-mail sent to [lawcourt.clerk@maine.gov](mailto:lawcourt.clerk@maine.gov) on or before June 19, 2009.

The proposed amendments, other than those that make minor editing changes in the Rules, are briefly summarized as follows:

The amendment to Rule 7(a) establishes a predictable time for filing the appellee's brief (9 weeks) following the filing of the record, rather than having the timing for the appellee's brief triggered by whenever the appellant's brief may be served. The change will permit better planning by the appellee. It will also permit the Clerk to circulate a briefing schedule that has a specific due date for both the appellant's brief (5 weeks) and the appellee's brief (9 weeks) after filing of the record.

The amendment also removes the direction that the Clerk notify parties of the "term" when the appeal would be considered. Scheduling practice for appeal consideration has not been tied to terms of the Law Court for some time. The rule change will permit the Clerk to indicate, probably in the briefing schedule, a date after which the appeal may be in order for consideration.

The amendment to rule 7(c) encourages filing of briefs electronically in addition to the paper briefs, specifies an email address where the briefs may be filed, and three alternative formats in which the briefs may be filed. A similar amendment is made to the Appendix Rule 8(b)(3). Concurrently, Rule 12A(a)(4) is amended to be consistent with these changes. Rule 12A(a)(4) is the current rule that encourages electronic filings of briefs and appendices by submitting a CD. The current rule also prohibits email filings.

The primary purpose of the proposed amendments to Rule 8 is to clarify and confirm the requirements for document organization and appendix preparation. Key changes clarify and restate the provisions addressing documents that are mandatory and the order in which those documents are to appear. Additionally, a more explicit sanctions section, (c)(5), lists the major problems identified in application of the appendix rule and warns of sanctions for noncompliance.

Rule 8(b) is amended to change the time for filing the appendix to fourteen days after the appellant's brief rather than fourteen days before the appellee's brief, as this date can be explicitly identified—it is seven weeks after the filing of the record, unless an extension is granted.

Rule 8(b)(3) is amended to include an encouragement for electronic filing by email similar to changes proposed to the briefing rule. However, only filing in .pdf format would be permitted.

The amendment to Rule 8(f) would make the rule consistent with the recent change in the First Circuit appendix rule requiring that appendices be printed on both sides of a page.

The amendment to Rule 8(h)(2) is designed to emphasize the importance of including in the appendix municipal ordinances governing actions subject to review and to require that those ordinances in the appendix include the ordinances giving the agency from which the appeal is taken authority to act.

Rules 9(a) and (b) of the briefing rules are amended to require that a statement of the standard of appellate review to be applied to each issue on appeal be included with the statement of the issue.

**[The draft Rule Amendments appear below]**

STATE OF MAINE  
SUPREME JUDICIAL COURT  
AMENDMENTS TO THE  
MAINE RULES OF APPELLATE PROCEDURE

**DRAFT 05-21-09 DRAFT**

Effective: July 1, 2009

All of the Justices concurring therein, the following amendments to the Maine Rules of Appellate Procedure are hereby adopted to be effective on the date indicated above. The specific rules amendments appear below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 7 of the Maine Rules of Appellate Procedure is amended to read as follows:

## **RULE 7. SCHEDULE FOR BRIEFING AND CONSIDERATION**

**(a) Notice.** Upon docketing of the reporter's transcript and the trial court clerk's record, the Clerk of the Law Court shall send forthwith to each counsel of record and each party who is not represented by counsel a written notice stating the dates on which the appellant's and the appellee's briefs and the appendix are due to be filed, the date on which appellant's reply brief, if any, is due to be filed and the ~~term of the Law Court at which the case~~ date after which the appeal will be in order for consideration.

**(b) Time for Filing Briefs.** The appellant shall file the appellant's brief within 35 days (5 weeks) after the date on which the record is filed in the Law Court. The appellee shall file the appellee's brief within ~~28 days after service of the brief of the appellant~~ 63 days (9 weeks) after the date on which the record is filed in the Law Court, and the appellant may file a reply brief within 14 days after service of the brief of the appellee.

**(c) Number of Copies to be Filed and Served.** Unless otherwise ordered by the Law Court, 10 copies of each brief shall be filed with the Clerk of the Law Court and two copies of each brief shall be served on each of the other parties who are separately represented or unrepresented. The Clerk of the Law Court will not accept a brief for filing unless it is accompanied by acknowledgement or certificate of service upon the other parties.

Parties are encouraged, but not required, to also file and serve briefs electronically. An electronically filed brief shall be filed with the Law Court as an attachment to an e-mail mailed to the Clerk of the Law Court e-mail address < >. An electronically filed brief shall be e-mailed to each of the other parties only if

a party has designated an e-mail address for receipt of service. The electronically filed brief shall be in portable document format (.pdf), rich text format (.rtf), or Microsoft Word document format (.doc or .docx). Electronic filing and service does not constitute formal filing and service of a brief, which must be made by timely filing and service of paper copies of the brief as required by these rules. The wording and organization of the electronically filed brief shall be identical in all respects to that of the paper brief.

**(d) Consequence of Failure to File Briefs.** If an appellant fails to comply with this rule, the Law Court may dismiss the appeal for want of prosecution. If an appellee fails to comply with this rule, the appellee will not be heard at oral argument except by permission of the Law Court.

**(e) Scheduling of Consideration.** All appeals shall, unless the Law Court otherwise directs, be in order for oral argument or other consideration 14 days after the date on which the appellee's brief is due to be filed or is filed, whichever is earlier.

### **Advisory Notes**

There are several proposed amendments to Rule 7. The amendments to Rule 7(a) recognize that many appeals involve one or more unrepresented parties by clarifying language to be consistent with established practice that all parties, not just "counsel," receive notices. The amendment also recognizes that Law Court scheduling is no longer tied to terms. Further, with the Court's current workload, it is no longer possible to accurately identify the month in which an appeal may be considered.

The amendment to Rule 7(b) changes briefing schedule practice to identify a specific date, 63 days (9 weeks) following filing of the record when an appellee's brief is due. Specific dates will be identified in the briefing schedule sent by the Clerk of the Law Court. In current practice the time for filing the appellee's brief is entirely dependent on the time of receipt of the appellant's brief. This made work planning difficult in some busy practices. The change should not result in significant delay in considering most appeals. In recent experience, over 95% of appellants' briefs are filed at or very close to the filing deadline. When the time for filing an appellant's brief is extended, the appellee would receive a similar extension

Rule 7(c) is amended to encourage, but not require, the parties to send

electronic copies of briefs via e-mail, in addition to filing the printed copies. The electronic filing procedure is subject to certain conditions specified in the Rule. This is also a change in Rule 12A(a)(4), which is being amended, and which had encouraged parties to send copies of briefs on a compact disk and not by e-mail. Now e-mail will be the permitted method for service of electronic copies.

2. Rule 8 of the Maine Rules of Appellate Procedure is amended to read as follows:

### **RULE 8. APPENDIX TO THE BRIEFS**

**(a) By Whom Filed.** In every case the party who files the first notice of appeal shall file an appendix to the briefs, except that in child protection matters, 22 M.R.S.A. §§ 4001-4071, the Department of Human Services shall be responsible for the filing of the appendix.

**(b) Number of Copies, When Filed.** (1) Eight copies of the appendix shall be filed no later than 14 days ~~before~~ after the date on which the ~~appellee's~~ appellant's brief is due to be filed. In child protective cases, the Department of Human Services shall file the appendix with the Court no later than 14 days before the date on which the appellant's brief is due to be filed.

(2) When the appendix is filed with the Court, a copy shall be served on each other party to the appeal.

(3) Parties are encouraged, but not required, to also file and serve the appendix electronically. An electronically filed appendix shall be filed with the Law Court as an attachment to an e-mail mailed to the Clerk of the Law Court e-mail address < >. An electronically filed appendix shall be e-mailed to each of the other parties only if a party has designated an e-mail address for receipt of service. The electronically filed appendix shall be in portable document format (.pdf). Electronic filing and service does not constitute formal filing and service of an appendix, which must be made by timely filing and service of paper copies of the appendix as required by these rules. The contents of the electronically filed appendix shall be identical in all respects to that of the paper appendix. No electronically filed appendix shall be presented to the Law Court and the other parties to the appeal unless the contents are identical to that of the paper appendix.

**(c) Contents, Generally.** The purpose of the appendix is to make available to each justice of the court those documents from the record that are particularly important to the review of the issues on appeal. The Law Court always has the entire original trial court file available to it for reference; therefore:

(1) The appendix shall contain those documents listed below as mandatory.

(2) The appendix shall not include any documents that are not a part of the trial court file or the record on appeal, other than a supplement of legal authorities authorized in subdivision (l) hereof.

(3) Documents other than those that are designated “mandatory” below should be included only if they are important to the issues on appeal, and documents that are not “mandatory” shall be placed in the appendix following the “mandatory” documents.

(4) Duplication must be avoided. No document shall appear in the appendix more than once.

(5) An appendix that (i) fails to include mandatory documents, or (ii) does not present documents in the required order: first documents required by subdivision (g), then documents required by subdivision (h), then other documents, or (iii) includes excessive duplication of documents, or (iv) otherwise is not prepared in compliance with these rules may be rejected, with the party who prepared the appendix being required to prepare and file a replacement appendix that complies with these rules or be subject to another appropriate sanction, including dismissal of the appeal.

**(d) Contents, Agreement of the Parties.** The parties are encouraged to confer and reach agreement on the contents of the appendix, ~~so long as the contents~~ comply that complies with this rule. If the parties do not agree:

(1) No later than 14 days before the appellant’s brief is due to be filed, the appellant shall deliver to the appellee a list of the documents ~~which~~ that the appellant proposes to include in the appendix. In child protective protection cases in which the State is the appellee, the appellant shall deliver to the appellee the list of the documents ~~which~~ that the appellant proposes to include in the appendix at least 14 days before the appendix is due to be filed.

(2) If the appellee wishes to have additional documents included in the appendix, the appellee must, within 7 days, designate additional documents for inclusion in the appendix, and the appellant shall include those documents in the appendix, unless otherwise ordered by the court.

(e) **Content, Costs.** Unless otherwise agreed by the parties, the appellant shall be responsible for the costs of producing the appendix. If the appellee designates documents for inclusion that are not mandatory documents and the appellant concludes are unnecessary to a determination of the issues, the appellee shall be responsible for advancing the additional cost of producing those documents. Following an appeal in a civil case, any of the costs incurred in the production of the appendix may be taxed to either party by the Law Court.

(f) **Content, Format.** The appendix shall be bound in white stock, and each page shall be numbered consecutively. If the appendix consists of 20 pages or less, it may be bound with the appellant's brief. Otherwise, it shall be separately bound with a white cover page designated Appendix and carrying the Law Court docket number, case title, and appearances of counsel or unrepresented parties for the appeal. The appendix shall be reproduced by standard printing or by any duplicating or copying process capable of producing a clear black image on white paper. Printing shall be on ~~one side~~ both sides of each page. The pages shall be 8 1/2 x 11 inches. The appendix shall be spiral bound or bound by a similar process that permits the pages to lie flat when opened. Plastic or metal spikes or posts shall not be used in binding. No volume of an appendix shall exceed 150 pages, ~~and no appendix shall exceed two volumes~~ without prior approval of the Court.

(g) **Contents, Mandatory - ALL APPEALS.** The following documents shall be contained in the appendix in the following order:

(1) A table of contents;

(2) All docket entries in the proceedings below;

(3) The Each trial court decision, ruling, or judgment appealed from that will be addressed in the appeal, and including the final judgment:

(A) If the decision is in written form, a copy of the decision shall be included;

(B) If the decision or judgment includes more than one order or set of findings, a copy of each court action that constitutes the decision or judgment shall be included;

(C) If any part of the decision was stated orally on the record, a copy of the transcript of the decision shall be included.

(4) The complaint, charging instrument, or initiating document.

**(h) Contents, Mandatory - SPECIFIC PROCEEDINGS.**

~~In addition to~~ Following the contents required by subdivision (g), the appendix shall contain the following contents for specific proceedings:

**(1) Summary Judgment.**

If the appeal relates to the entry of a summary judgment, a copy of ~~both~~ the parties' statements pursuant to M.R. Civ. P. 56(h).

**(2) Local Government and Administrative Appeals.**

(A) If the appeal relates to the decision of ~~an~~ a State or local agency, including a municipality, board, commission, or other administrative body, a copy of the agency's decision, whether written or transcribed.

(B) If the agency decision was based on an ordinance, regulation, or Private and Special Law, a copy of the relevant provision from that ordinance, regulation, or Private and Special law, shall ~~also~~ be included. For appeals from decisions of a municipal agency, a copy of the municipal ordinance that establishes the authority of the agency to act on the matter subject to the appeal shall be included. Copies of sections of the Maine Revised Statutes shall not be included.

**(3) Jury Instructions.**

If the appeal includes a challenge to a jury instruction, a copy of the transcript of the instruction, a copy of the transcript containing the objection to the instruction, and copies of any relevant requests to the trial judge for different instructions than those given to the jury by the trial judge.

**(4) Jury Verdict, Special Verdict Form.**



If the appeal is from a judgment entered on the verdict of a jury, and the jury reported its verdict on a written form, a copy of that form and a transcript or copy of the objections to that form if any.

**(5) Contract.**

If the appeal relates to the interpretation or enforcement of a contract, a copy of that contract.

**(6) Family matters.**

If the appeal challenges a decision related to a family matter:

The child support affidavits, if child support is challenged;  
 The financial statements of the parties if property distribution or child or spousal support is challenged;  
 The report of the guardian ad litem, if any, if a parental right's decision is challenged.

**(7) Transcript.**

~~In addition to filing the appendix, the appellant shall provide to the Court one additional copy of any transcripts that have been prepared pursuant to Rules 5(b) and 6(c) hereof. Unless the transcript is very brief, it should not be included in full in the appendix.~~ The appendix should include only those limited and focused portions of the transcript that are necessary to a full understanding of the issues on appeal.

**(i) Contents, Discretionary.** The following materials may be included in an appendix but are not required:

**(1) Exhibits.**

If particular exhibits are important to the Court's understanding of the issues on appeal, the appendix may include copies of those exhibits.

**(2) Other Pleadings.**

Other pleadings or filings, but only if they are important to the Court's understanding of the issues on appeal.

**(j) Failure to File an Appendix.** The failure to file an appendix, or the failure to include in the appendix any document required to be included as set out in this rule, may result in the dismissal of the appeal or other sanction.

**(k) Hearing on the Original Record Without the Necessity of an Appendix.** The Law Court may on good cause shown, on motion filed prior to the filing deadline for appellant's brief, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the Law Court may require.

**(l) Supplement of Legal Authorities.** A supplement of legal authorities is not required. The parties may, at their discretion, provide the court with a brief supplement, separate from the appendix, containing important, relevant legal authorities such as decisions from other jurisdictions. It is not necessary to provide copies of any or all cited authorities. The supplement of legal authorities is not counted in computing the appendix page limit.

### **Advisory Notes**

Rule 8 is amended in several respects to clarify current practice regarding preparation and filing of the appendix. Rule 8(b)(1) is amended to change the time for filing the appendix from the present 14 days before the appellee's brief is due to 14 days after the appellant's brief is due. The appellant's brief is due at a time certain, 35 days after the filing of the record. This change makes the appendix due also at a time certain, 49 days (7 weeks) after the filing of the record. The Court's schedule for filing briefs and appendices provided to each party in each case, will indicate specific dates for filing of the appellant's brief, the appendix, and the appellee's brief as a result of the changes adopted in this rules amendment order.

Rule 8(b)(3) is amended to permit electronic filing of the appendix in the same manner as electronic filing of the brief is permitted in Rule 7(c). One difference is that the appendix may only be filed by email in .pdf format. As with the briefing rule, filing of the appendix by email is encouraged. However, filing of the paper appendix remains mandatory. If a party elects to file an electronic copy of the appendix, the contents of the document must be identical to the printed appendix.

Rule 8(c)(3) is amended to clarify that documents that are not mandatory pursuant to Rules 8(g) and 8(h) should be placed in the appendix following the mandatory documents.

Rule 8(c)(5) is adopted to specify areas where, in the past, there has been a significant lack of compliance with the appendix rules and to caution that such lack of compliance, in the future, is more likely to invite sanctions. Sanctions may range from being required to redo the appendix in proper form to dismissal of the appeal. The areas in which there has been a significant lack of compliance with the rules in past practice include: failure to include within the appendix those documents designated as mandatory by Rules 8(g) and 8(h); failure to present the mandatory documents in the required order in the appendix; and excessive duplication of documents in the appendix despite the directive of Rule 8(c)(4) that duplication of documents should be avoided. After a document appears in the appendix once, future places where that document should appear should include only a one page cross-reference to the document at the point where it originally appears.

In the past there has been a significant practice of filing appendices with documents organized in chronological order from the first documents that appear in the record to the most recent documents that appear in the record. This is improper under the rules that have been in effect since 2001. All appendices should include documents in the following order: (1) a table of contents; (2) the trial court docket entries, including all docket entries if the matter was transferred from the District Court to the Superior Court or was subject to a venue transfer from one court to another court; (3) the judgment or judgments and court orders that will be addressed in the appeal, including the final judgment; (for example, if a ruling on a motion to suppress is subject to challenge, the court order addressing the motion to suppress must be included and also the final judgment must be included), (4) the charging document or complaint which initiated the action and, if the complaint was amended, a copy of the amended complaint that served as the basis for the judgment. Following these documents should be any documents that are mandatory pursuant to Rule 8(h).

Rule 8(e) is amended to clarify that an appellant is entitled to request that an appellee pay for part of the cost of preparing an appendix only if the documents that the appellee seeks to include, and that the appellant believes are unnecessary, are not mandatory documents.

Rule 8(f) is amended, in a manner similar to a recent rules amendment

adopted by the First Circuit Court of Appeals, to require that the appendix be printed on both sides of each page. With this change, the size of the appendix is limited to one volume not exceeding 150 pages unless the Court approves a larger number of pages.

Rule 8(g)(3) is amended to clarify that following the docket entries must appear each trial court judgment, order, or decision that will be addressed in the appeal and including the final judgment.

Rule 8(h)(2) is amended to add a requirement that for appeals from municipal agency decisions, the appendix must include a copy of the municipal ordinance authorizing the action of the municipal agency from which the appeal is taken. This is to assure that the Court has available the authorizing ordinance to determine, for example, whether the agency should have considered the matter de novo or as an appellate body, and whether the agency had jurisdiction to hear the matter presented to it.

Rule 8(h)(7) is amended to remove the requirement that the appellant file with the Court an additional copy of the transcript of any proceeding, beyond the copy that has already been provided to the court by the court reporter. As amended, Rule 8(h)(7) notes that the portions of transcripts included in the appendix should include only those limited and focused portions of the transcript that are necessary to a full understanding of the issues on appeal.

3. Rule 9(a) and Rule 9(b) of the Maine Rules of Appellate Procedure are amended to read as follows:

**(a) Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

**(1)** A table of contents, with page references, and a table of cases, statutes and other authorities cited.

**(2)** A statement of the facts of the case, including its procedural history.

**(3)** A statement of the issues presented for review, and the standard of appellate review applicable to each issue presented for review.

**(4)** An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the

issues presented, and the reasons ~~therefor~~ for the argument, with citations to the authorities and particular pages of the record relied on. The brief of the appellant shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

**(b) Brief of the Appellee.** The brief of the appellee shall conform to the requirements of subdivision (a) of this rule, except that a statement of the issues and standards of appellate review or of the facts of the case need not be ~~made~~ included unless the appellee is dissatisfied with the statement of the appellant. The brief of the appellee shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

### Advisory Notes

Rules 9(a) and 9(b) are amended to require that for each issue presented for appeal, the brief also state the standard of appellate review that will be applicable to resolution of each issue. This is to help assure proper focus on the proper standard of review for issues presented on appeal that is ignored in some brief writing practice. The appellate standard of review for most issues will fall into one of three broad categories: (i) “de novo” review, (ii) “clear error” or “sufficiency of evidence” review, and (iii) “abuse of discretion” or “unreasonable exercise of discretion” review.

The Law Court will review rulings of law “*de novo*,” meaning the Court will reach its own decision as to whether a ruling of law subject to appeal was correct or incorrect.

Cases involving mixed questions of law and fact will be reviewed *de novo* for errors of law if the parties stipulate or do not dispute the factual findings. *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2006 ME 44, ¶ 9, 896 A.2d 287, 291; *Trask v. Devlin*, 2002 ME 10, ¶ 14, 788 A.2d 179, 182. However, the Law Court will not review the record from the trial court and reach its own decision on the facts, and it will review deferentially for “clear error” findings based on inferences a trial court might draw from undisputed facts. *Cates v. Donahue*, 2007 ME 38, ¶ 9, 916 A.2d 941.

On factual issues, the Law Court will conduct a “deferential” review for “clear error,” meaning that it will defer to the fact-finder’s decision as to: (1) which witnesses to believe and not believe; (2) what significance to attach to particular evidence or exhibits; and (3) what inferences may or may not be drawn from evidence or exhibits. *Stickney v. City of Saco*, 2001 Me 69, ¶ 13, 770 A.2d 592,

600; *Sturtevant v. Town of Winthrop*, 1999 ME 84, ¶ 9, 732 A.2d 264, 267; *Lewisohn v. State*, 433 A.2d 351, 354 (Me. 1981). In “clear error” review, a fact-finding will be affirmed if supported by some evidence in the record unless, in rare circumstances, the trial court’s reliance on evidence is found to be clear error as a matter of law.

Trial court rulings on discretionary or procedural issues will be examined to determine whether the trial court “abused its discretion” or “exceeded the bounds of its discretion” in ruling as it did. Even if an appellate judge believes that he or she would have ruled differently on the question, the appeals court will uphold the ruling of the trial court unless it determines that the trial court exceeded the bounds of its discretion or that there is no rational basis for the trial court’s ruling.

4. Rule 12A(a)(4) of the Maine Rules of Appellate Procedure is amended to read as follows:

**(4) Electronic Filings.** Filings by electronic transmission of data or by means of a compact disk (CD) or any other method for electronic or internet filing in place of the filing of paper documents required by these rules is not permitted. Parties filing paper copies of briefs and appendices prepared pursuant to M.R. App. P. 8 and 9 and who utilized computerized electronic word processing or other electronic systems to prepare the briefs or appendices, are encouraged to file, with the required paper copies, a copy of the electronic file from which the brief or appendix was prepared and printed. Such filings should be by e-mail as specified in Rule 7(c) for briefs and Rule 8(b)(3) for the appendix. ~~CD, not by electronic transmission of data.~~ Filing of electronic copies of briefs and appendices along with the required paper copies of such documents, while encouraged, is not required.

### Advisory Note

These amendments to Rule 12A(a)(4) adjust to rule to encourage electronic filing of briefs and the appendix by e-mail rather than CD, to conform to the changes adopted to Rules 7(c) and 8(b)(3).

5. These amendments shall be effective July 1, 2009.

Dated: June --, 2009

[ -- signatures -- ]